Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

NEW YORK CITY, MARVA LIVINGSTON HAMMONS, as Commissioner of Social Services of the City of New York, and CLAUDE MEYERS, as Deputy Commissioner of Social Services of the City of New York,

Petitioners,

-against-

MARC TENENBAUM and MARY TENENBAUM, individually and on behalf of SARAH TENENBAUM, an infant,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 18, 2000

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QUESTIONS PRESENTED

(1) Did the Court of Appeals improperly redefine what constitutes an "emergency" removal of a child suspected of being the victim of parental abuse by adding an unprecedented requirement that there be insufficient time to obtain prior court authorization?

(2) Did the Court of Appeals improperly fail to recognize that an immediate medical examination is properly conducted when it is objectively medically indicated, as it was here, irrespective of whether it was also ordered for the forensic purpose of attempting to substantiate an allegation of abuse?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, were as follows: Marc Tenenbaum and Mary Tenenbaum, both individually and on behalf of Sarah Tenenbaum, an infant, were plaintiffs-appellees-cross-appellants; Nat Williams, individually and as a caseworker for the Child Welfare Administration, Veronica James, individually and as a caseworker for the Child Welfare Administration, Doby Flowers, individually and as Commissioner of Social Services of the City of New York, and Brooke Trent, individually and as Deputy Commissioner of Social Services of the City of New York, were defendants-cross-appellees; New York City was defendant-appellant-cross-appellee; and Marva Livingston Hammons, as Commissioner of Social Services of the City of New York, and Claude Meyers, as Deputy Commissioner of Social Services of the City of New York, were appellants-cross-appellees.

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Petition For Writ of Certiorari to the United States Court of Appeals For the Second Circuit

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was entered October 13, 1999. The opinion of the Second Circuit and the dissent therefrom were entered on October 13, 1999. They appear at 193 F.3d 581 and appear in the appendix at A1-56. The Second Circuit's denial of the petition for rehearing was entered December 27, 1999. That order is not reported. It appears in the appendix at

A123. The September 30, 1994 memorandum and order of the U.S. District Court for the Eastern District of New York is reported at 862 F. Supp. 962 and appears in the appendix at A57-96. The District Court's November 20, 1995 decision denying reconsideration appears at 907 F. Supp. 606 and appears in the appendix at A97-122.

JURISDICTION

The Second Circuit issued its judgment on October 13, 1999. The Second Circuit issued an order denying rehearing on December 27, 1999 (A123). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the United States Constitution states as follows:

> Section I . . . No State shall deprive any person of life, liberty, or property, without due process of law . . . .

At the time of the actions at issue herein, 42 United States Code § 1983 stated as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(amended 1996).

At the time of the actions at issue herein, New York Family Court Act § 1024, entitled Emergency removal without court order, provided, in pertinent part, as follows:

> (a) . . .a designated employee of a city . . . department of social services shall take all necessary measures to protect a child's life or health including, when appropriate, taking or keeping a child in protective custody . . . without an order under section one thousand twenty-two and without the consent of the parent or other person legally responsible for the child's care, regardless of whether the parent or other person legally responsible for the child's care is absent, if (i) such person has reasonable cause to believe that the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and

(ii) there is not time enough to apply for an order under section one thousand twenty-two.

(amended 1990).

New York Social Services Law § 383-b, entitled Medical treatment for abused or neglected children; consent of commissioners, provides, in pertinent part, as follows:

> The local commissioner of social services or the local commissioner of health may give effective consent for medical, dental, health and hospital services for any child . . . who has been taken into or kept in protective custody or removed from the place where he is residing, or who has been placed in the custody of such commissioner, pursuant to section four hundred seventeen of this chapter or section . . . one thousand twenty-four . . . of the family court act.

At the time of the actions at issue herein, New York Social Services Law § 417, entitled Taking a child into protective custody, provided, in pertinent part, as follows:

> 1. (a) Pursuant to the requirements and provisions of the family court act, . . . a designated employee of a city . . . department of social services shall take all appropriate measures to protect a child's life and health including, when appropriate, taking or keeping a child in protective custody without the consent of a parent or guardian if such person has reasonable cause to believe that the circumstances or condition of the child are such that continuing in his place of residence or in the

> care and custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health.

(amended 1996).

STATEMENT OF THE CASE

Nature of Case

Marc and Mary Tenenbaum, the parents of Sarah Tenenbaum, brought this civil rights action under 42 U.S.C. § 1983, individually and on behalf of their infant child Sarah, seeking damages for the allegedly unlawful and unconstitutional emergency removal of Sarah from school in January 1990 and the subsequent medical examination of Sarah that was conducted at Coney Island Hospital. These actions were taken during the course of the New York City Child Welfare Administration's ("CWA") investigation into allegations of sexual abuse made against the child's father, plaintiff Marc Tenenbaum. In addition to federal and state claims against individual CWA employees and state claims against the New York City Board of Education ("Board"), plaintiffs alleged municipal policy claims against the City of New York (the "City"), the Commissioner and Deputy Commissioner of Social Services, and the Board.

Statement of Relevant Facts

In September 1989, plaintiffs Marc and Mary Tenenbaum enrolled their daughter Sarah as a kindergarten student at P.S. 230 in Brooklyn where she was assigned to Mary Murphy's class. From the time that Sarah arrived in Mrs. Murphy's class, Sarah frequently fell asleep in class for long periods of time. She was very shy and did not interact with the other children in the class. She would seek out Mrs. Murphy to show her things, but Sarah's

verbalization was limited. On occasion, Sarah would cry in the morning in class. No other students in Mrs. Murphy's class slept in class as much as Sarah did nor was any other student as shy as Sarah was. Moreover, Mrs. Murphy did not have other students who had difficulty in expressing themselves orally to the extent Sarah did. Over the course of the Fall 1989 semester, Sarah attempted to communicate more with Mrs. Murphy and became increasingly comfortable with Mrs. Murphy in class. Sarah would show Mrs. Murphy pictures she had drawn and would speak in one or two word sentences.

Mrs. Murphy's class had a play area or "housekeeping area" which was equipped with pots and pans, toys, books and dolls. These dolls were made of soft plastic, did not have any sex designation, did not have any genitalia and were approximately 14 to 16 inches in length. Some of the dolls were clothed and some were not clothed because the children would sometimes take the clothes off during play.

On January 4 and 5, 1990, Sarah Tenenbaum communicated information to her teacher, Mary Murphy, in words and gestures that led Mrs. Murphy to believe that Sarah's father hurt her in her vaginal area at night. One of the gestures that Sarah made was to point to the groin area of one of the dolls in the play area of her classroom when asked by Mrs. Murphy where Sarah was hurt. Mrs. Murphy advised P.S. 230's guidance counselor, assistant principal, and principal about what Sarah had communicated to her.

Mary Murphy, as a public school teacher, was an official required to report cases of suspected child abuse or maltreatment ("mandated source" or "mandated reporter") to the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment. Alternatively, she may report a case of suspected abuse or

maltreatment to the person in charge of the school who is then responsible for reporting the allegation to the Central Register or causing the allegation to be reported. The Central Register receives reports of suspected child abuse and maltreatment by telephone and facsimile machine twenty-four hours a day, seven days a week. Telephone operators record the allegations of each telephone call and facsimile message on a DSS Form 2221 ("2221 Report"). Each 2221 Report is sent by facsimile machine to the appropriate local child protective agency for investigation.

P.S. 230's guidance counselor, Susan Raiten, called the State Central Register on the morning of Friday, January 5, 1990 and reported what Sarah had communicated to Mrs. Murphy. This information was recorded on a 2221 Report and faxed to the CWA Brooklyn Field Office. In the portion of the 2221 Report that states the reasons for suspicion of child abuse, it is written: "Sarah is speech and language delayed. Sarah unable to stay awake during the day. Ch [Child] often naps off and on all day. Ch [Child] is nervous and withdrawn. Ch [Child] is afraid of fa [father]. Fa [Father] hurts her vaginal area at night."

After initial processing, the allegations contained in the 2221 Report were assigned to the child protective unit in CWA's Brooklyn field office, which was supervised by Nat Williams, a "Supervisor II." After reviewing the allegations contained in the 2221 Report, Mr. Williams assigned the case to Veronica James, a caseworker under his supervision. After reviewing the allegations with Ms. James, Mr. Williams instructed Ms. James to contact the source of the report of suspected child abuse to verify that the allegations contained in the 2221 Report were accurate and to obtain more information about the source's allegations. Ms. James attempted to speak with Mrs. Murphy by telephone on the afternoon of January 5, 1990,

but Mrs. Murphy had already left P.S. 230 for the day. Mr. Williams then instructed Ms. James to visit plaintiff's home along with a coworker, Thomas O'Connell, to investigate the allegations in the 2221 Report.

Ms. James and Mr. O'Connell visited the Tenenbaums at their home early that same evening. They identified themselves as employees of CWA and said that they were there to investigate allegations of suspected abuse, neglect or maltreatment. The Tenenbaums consented to have Ms. James examine Sarah for marks or bruises. Ms. James observed a strawberry mark on Sarah's inner thigh. Mrs. Tenenbaum advised Ms. James that this was a birthmark.

On Monday, January 8, 1990, Ms. James visited P.S. 230 to interview Mrs. Murphy and Sarah. Ms. James identified herself as being employed by CWA and explained that she was at P.S. 230 as part of an investigation into the allegations contained in the 2221 Report that had been called in by Ms. Raiten. Ms. James spoke with Mrs. Murphy, who related the basis for her understanding that Sarah had communicated to her that Sarah's father hurt her in her vaginal area.

After leaving the school, Ms. James reported what she had learned at P.S. 230 to Mr. Williams. Mr. Williams instructed Ms. James to go to P.S. 230 to effect an emergency removal of Sarah, pursuant to New York Social Services Law § 417 and New York Family Court Act § 1024, in order to have her medically examined for possible sexual abuse at Coney Island Hospital.

On Tuesday, January 9, 1990, Ms. James visited P.S. 230 and gave the school officials a form she signed which indicated that Ms. James, as a designated employee of a city department of social services, was taking Sarah into protective custody pursuant to Social Services Law

§ 417 and Family Court Act § 1024. Ms. James removed Sarah from school and took her to Coney Island Hospital early in the afternoon on January 9, 1990.

Sarah was examined by a pediatrician and a gynecologist at Coney Island Hospital. The medical report of the examination which was given to Ms. James on January 9, 1990 states that there was no apparent evidence of the introduction of a foreign object into Sarah's vagina but that sexual abuse could not be ruled out.

While Sarah was at Coney Island Hospital, Mr. Williams spoke with Mrs. Tenenbaum on the telephone to advise her that CWA had effected the emergency removal. Mrs. Tenenbaum went to CWA's Brooklyn Field Office, after her telephone conversation with Mr. Williams. Mr. Tenenbaum arrived later, at approximately 6:00 p.m. Ms. James took Sarah from the hospital to the Brooklyn Field Office after the medical examination was concluded. Sarah was at the hospital for approximately four hours.

Mr. Williams advised the Tenenbaums of the allegations of sexual abuse that had been made against Mr. Tenenbaum. He further advised the Tenenbaums that since the medical examination did not find evidence that Sarah was sexually abused, he was returning Sarah to the Tenenbaums' custody. Sarah was then returned to the Tenenbaums' custody and she returned home with her parents that evening.

Jurisdiction, Course of Proceedings, and Disposition in District Court

The District Court had jurisdiction of the original action herein pursuant to 28 U.S.C. § 1343, as this was an action brought pursuant to 42 U.S.C. § 1983, and pursuant to 28 U.S.C. § 1331, as this was a civil action raising questions of federal law. Plaintiffs sought relief from defendants under 42 U.S.C. § 1983, based on their claims

that, pursuant to a municipal policy or practice, the City defendants removed their infant daughter, Sarah, into City custody and arranged for a medical examination of Sarah, without notice to the Tenenbaums, their consent, or a Court order, and that such actions were violations of plaintiffs' constitutional rights. Plaintiffs also posed claims against the Board of Education, as well as state law claims against all defendants, over which the District Court had jurisdiction pursuant to the doctrine of pendent jurisdiction.

Defendants moved for summary judgment, and plaintiffs cross-moved for partial summary judgment. By Memorandum and Order dated September 30, 1994, the District Court denied in part and granted in part defendants' motion and denied plaintiffs' cross-motion (A57-96).

The Court ruled that all defendants were entitled to summary judgment on plaintiffs' substantive due process claim, as

> defendants' deprivation of the Tenenbaums of their child for a single afternoon for a medical examination did not significantly infringe their fundamental right to live together without interference from the state

(A66-67).

Next, the Court turned to plaintiffs' procedural due process claim regarding defendants' removal from school without either a court order or parental consent. The Court, noting that "[t]he pivotal question . . . is whether Sarah's removal was justified as an appropriate response to a legitimately perceived emergency," and, therefore "neither parental consent nor prior judicial approval was required" (A68), concluded that

> [a] CWA worker, in possession of [the information that Sarah had communicated to

> her teacher and the teacher had then reiterated to defendants James], would have reasonable cause to conclude that Sarah had been a victim of sexual abuse by her father, and that returning the child to her home would place her in imminent risk for further abuse

(A69) and that, therefore, an emergency was indicated (A69). Thus, the Court found,

> as a matter of law, that the information provided by [the teacher] to James established reasonable grounds for the emergency removal of Sarah. Accordingly, none of the defendants violated a due process right of any of the plaintiffs"

(A72), and the District Court found that all defendants were entitled to summary judgment on this claim (A72). The Court also found, as an alternate ground for granting summary judgment in favor of Williams, James, Flowers, and Trent, that they were entitled to qualified immunity (A72-73).

Next, the District Court addressed Marc and Mary Tenenbaum's claim that "defendants unconstitutionally interfered with their parental rights by having a pediatrician and gynecologist at Coney Island Hospital examine Sarah" (A73) and concluded that "[g]iven the highly intrusive nature of [the] examination, which was solely for investigative purposes," plaintiffs' constitutional rights had been violated (A73). The Court reasoned that once Sarah was in CWA's custody, "[s]he was then no longer in what was perceived to be harm's way" and, thus,

> procedural due process required notice to the parents and judicial authorization before

> Sarah could be subjected to an inspection of her vagina and surrounding area

(A73-74) (citing van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863, 867 (2d Cir. 1990)). The Court also concluded that "Sarah, almost certainly, did, in fact, experience psychological injury on January 9, 1990" (A75). Thus, the Court found that plaintiffs' "procedural due process rights were violated by the manner in which Sarah was subjected to a medical examination" (A75). The Court did, however, find that Williams, James, Flowers, and Trent were entitled to qualified immunity and, thus, summary judgment on this claim, as "[t]he events at issue in the present case . . . occurred when the law . . . was not settled, prior to the Second Circuit's decision in van Emrik" (A75).

The District Court next turned its attention to plaintiffs' Fourth Amendment claims -- the seizure of Sarah from school and the medical examination of Sarah performed by doctors at Coney Island Hospital. While the Court did recognize that defendants' taking of Sarah from school into their custody did constitute a seizure implicating Sarah's Fourth Amendment rights, the Court found that such seizure did not implicate the parents' Fourth Amendment rights (A76-77). Regarding Sarah's Fourth Amendment right implicated by her removal, the Court found that both "the probable cause and warrant requirements apply to child abuse searches and seizures under the Fourth Amendment" (A83), and concluded that there was probable cause for Sarah's emergency removal and, thus, her Fourth Amendment rights were not violated by the removal (A84). Regarding the individual defendants, the Court also found that they were immune from liability on this claim

> because the application of the probable cause and warrant requirements to child

> abuse investigations by caseworkers was unsettled at the time of defendants' investigation, and still . . . is unclear

(A84), and, in any case, it was objectively reasonable for the individual defendants to believe they did not violate any Fourth Amendment rights by seizing Sarah (A84).

The District Court continued, concluding that plaintiffs have no constitutional "right to an 'adequate investigation' prior to 'endangerment' of their constitutional rights," noting that defendants had probable cause to seize Sarah (A87). The Court also found that plaintiffs have no private right of action under 42 U.S.C. § 671(a) upon which to base their claims that defendants failed "to make 'reasonable efforts' to provide services to preserve their family" (A88). The Court further found that Mary Tenenbaum's rights were not violated by virtue of Sarah's removal and examination based upon allegations of abuse by her husband alone -- and not by her (A88-89).

The District Court then addressed plaintiffs' claims against the Board of Education. The Court found no merit to plaintiffs' claim that the Board of Education should not have permitted CWA's removal of Sarah from school and further noted "the absence of any material fact which calls into question the propriety of what Murphy and the others at the school did, or did not do, regarding Sarah's removal" (A91). The Court did, however, rule that plaintiffs' claim "that school employees searched Sarah pursuant to Board policy, sometime prior to the CWA investigation" (A91) would survive summary judgment due to a material issue of fact (A91).

Finally, the Court granted summary judgment to all defendants on all of plaintiffs' state law claims. The Court based this resolution of the state law claims on the fact that New York law provides absolute immunity for both

municipal employees performing discretionary functions and for the municipality itself against claims based on discretionary acts of its officials (A94-95).

Defendants' Motion To Reconsider and Revise the September 30, 1994 Order and the Court's Order Denying Such Motion

On November 25, 1994, defendants filed a motion, pursuant to Federal Rules of Civil Procedure Rules 54(b) and 6(b) and Local Civil Rule 3(j), for reconsideration and revision of the District Court's September 30, 1994 Memorandum and Order. Defendants alleged that the Court had overlooked material facts and controlling authority in reaching its determination that defendants had violated the Fourth and Fourteenth Amendments by performing a gynecological examination of Sarah without either parental consent or a Court order.

By Memorandum and Order dated November 20, 1995 (A97-122), the District Court denied defendants' motion on the ground that such motion was untimely, as was conceded by defendants, and defendants, in the Court's opinion, did not offer a sufficient reason upon which the Court could base an exercise of discretion so as to enlarge the time for the motion and convince the Court to consider the motion on its merits.

The Trial on Damages and the Parties' Respective Notices of Appeal

Thereafter, a trial on damages was held, after which Marc and Mary Tenenbaum were awarded $1.00 each and Sarah Tenenbaum was awarded $15,000.

The City filed a Notice of Appeal dated November 18, 1997. Plaintiffs filed a Notice of Cross-Appeal dated December 4, 1997. A judgment was thereafter first issued in the Eastern District of New York on January 27, 1998.

That judgment was then replaced, due to errors contained within, with a corrected judgment, dated February 25, 1998.

Disposition in Court of Appeals

By opinion entered October 13, 1999, the Court of Appeals affirmed in part, vacated in part, and remanded the matter to the District Court. The Court of Appeals, inter alia, (1) reversed the decision of the District Court and denied summary judgment in favor of the municipal defendants on the Tenenbaums' and Sarah's procedural due process and Sarah's Fourth Amendment challenge to defendants' removal of Sarah from her school on January 9, 1990, upon an allegation that she had been sexually abused by her father and (2) affirmed the District Court's decision granting summary judgment in favor of plaintiffs on the Tenenbaums' and Sarah's procedural due process and Sarah's Fourth Amendment challenge to the medical examination of Sarah that occurred on the same date, following her removal, at Coney Island Hospital.

On plaintiffs' procedural due process claims, the Court of Appeals ruled that:

> a properly instructed jury could conclude that at the time the case-workers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah's safety, to seek a court order

(A19) and that "[i]f there was a reasonably sufficient time, there was no emergency" (A19). Similarly, the Court of Appeals held that a violation of Sarah's Fourth Amendment rights would be and could reasonably be established if a jury were to find either (1) that Sarah's removal was effected without probable or reasonable cause to believe that Sarah would have been subject to the danger of abuse if not removed before court authorization could have been

obtained or (2) that the circumstances were not so exigent that a court order could not be obtained before removing Sarah without subjecting her to the danger of abuse (A34-40).

The Court, however, granted qualified immunity to the individual defendants, concluding that:

> not until today have we specifically held that where there is reasonable time consistent with the safety of the child to obtain a judicial order, the "emergency" removal of a child is unwarranted

(A22) and that, thus, the principle was not clearly enough articulated in 1990 "to require the defendants to answer in damages for their failure to abide by it at that time" (A22). The Court of Appeals further stated as follows:

> Because we now hold that it is unconstitutional for state officials to effect a child's removal on an "emergency" basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability for such actions because the law is not "clearly established."

(A22). Similarly, for purposes of Sarah's Fourth Amendment claim relating to the removal, the Court concluded that the individual defendants were entitled to qualified immunity (A40).

The Court of Appeals, acknowledging the City's admission that both Sarah's removal and her examination were admittedly effected pursuant to City policy, concluded that a finding that the removal violated plaintiffs' procedural due process rights would result in City liability,

if such removal was made pursuant to a City custom or policy. Similarly, the Court of Appeals concluded, the City would also be liable for violating Sarah's Fourth Amendment rights relating to the removal (A41).

The Court of Appeals further held that Sarah's examination violated Sarah's and the Tenenbaums' procedural due process rights, because the purpose of the examination was investigative. The possibility of finding injuries in need of treatment, the Court of Appeals held, could not "turn an investigative examination into one that is 'medically indicated' and designed for treatment" (A27-28). The Court of Appeals further concluded that:

> if Sarah had ever been in imminent danger, she was not by the time she was taken to the hospital in the custody of the CWA [and that, therefore, t]he caseworkers were required under *van Emrik* either to notify the Tenenbaums that Sarah was about to undergo a medical procedure and obtain the approval of either of them or to obtain judicial authorization.

(A28). Similarly, the Court of Appeals agreed with the District Court's finding that the examination violated Sarah's "Fourth Amendment right to be free from warrantless searches" (A41).

The Court of Appeals did, however, conclude that the individual defendants were entitled to qualified immunity regarding the due process claims based upon the examination, because it had not already been clearly established at the time of the action in question herein that "subjecting a child to invasive investigatory medical examination in the course of an abuse investigation requires a court order absent parental consent" (A28). The Court of Appeals concluded similarly regarding the claim of a

Fourth Amendment violation against the individuals based on the examination (A42).

The Court of Appeals affirmed the District Court's grant of summary judgment in defendants' favor on plaintiffs' claim of violations of substantive due process (A28, A32).

Dissent in Court of Appeals

Judge Jacobs, in a separate opinion, concurred in part and dissented in part (A45-56). He agreed with the majority's dismissal of the Tenenbaums' substantive due process and state law claims. However, he "dissent[ed] from the remainder of the opinion," finding "no constitutional violation" and, thus, would not have reached the issues of qualified immunity or damages (A45).

Judge Jacobs found fault with the majority's announcement that there is no emergency, despite the presence of exigent circumstances, and, thus, a removal cannot be made without a court order:

> None of our cases has held that the availability of the emergency-removal exception depends on whether there is time to obtain judicial pre-authorization. Each of our prior cases requires only that an emergency exist, a fact that is determined by reference to the child's peril, not the case worker's schedule or the court's calendar. This is a sensible formulation, and one that keeps the child welfare worker focused on what matters first in these cases, the child's precarious welfare.

(A46). The dissent views the majority's error as one of "recast[ing] a child-welfare emergency in terms of a procedural emergency" (A46) and anticipates that it will

result in child-welfare workers deciding "to get a court order regardless of risk to the child" (A48).

Regarding the claims based on the examination of Sarah, Judge Jacobs concluded that the majority erred in finding that an examination serving a medical purpose in addition to a law enforcement purpose was "investigatory" as defined in van Emrik and, therefore, not permitted absent judicial authorization or parental consent (A53-56).

REASONS FOR GRANTING THE PETITION

The issues the petition presents have nationwide importance to local child welfare agencies and the public at large. This case implicates the substantial governmental interest in protecting its most vulnerable portion of the population -- children. The new restrictions imposed on local authorities by the Second Circuit herein greatly restrict government's ability even to try to ensure the safety of its children, while imposing upon government personnel the great fear of being held liable for making decisions that err on the side of child protection. The law, as stated and understood before the Court of Appeals' decision in this case, struck a fair and reasonable balance between the government interest in protecting children and families' interest in avoiding unwarranted government interference in their lives.

We respectfully urge that certiorari be granted, because the Court of Appeals imposed requirements upon child protective agencies that are unreasonable, impracticable, beyond the Constitution, and against the interests of public welfare.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IMPROPERLY REDEFINED "EMERGENCY" AND IMPOSED A NEW STANDARD TO THE DETERMINATION OF WHAT CONSTITUTES AN EMERGENCY REMOVAL AND, THEREFORE, IS PERMITTED ABSENT A COURT ORDER.

As the dissent below notes, the decision of the Court of Appeals applies a new standard to the analysis of whether "emergency" circumstances existed and, thus, validate the removal of a child suspected of being the victim of abuse (A46). Whereas past analysis of whether the circumstances of a removal constituted an "emergency" previously has turned solely on an objective assessment of the perceived level of danger the child was in (A52), see, e.g., Ram v. Rubin, 118 F.3d 1306, 1311 (9th Cir. 1997); Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987); Lossman v. Pekarske, 707 F.2d 288, 291 (7th Cir. 1983), the Court of Appeals would have such analyses from hereon out depend on a determination of whether there is sufficient time to get a court order without the child being subjected to further danger (A18-20, A46-50, A52). This new standard announced by the Second Circuit herein finds no support in either the decisions of other circuits or the decisions of this Court.

The constitutionally protected interest in family relations, see Joyner v. Dumpson, 712 F.2d 770, 777-78 (2d Cir. 1983); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977), is limited by the compelling government interest in the protection of minor children, particularly where protection may be necessary against the parents themselves. See Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987). It falls upon the child welfare workers to

effectuate the appropriate balance between these competing interests.

Williams, the CWA supervisor who made the determination to remove Sarah, testified that he considered the situation on Tuesday, January 9, to be an emergency situation. Moreover, Williams explained that he waited until Tuesday, January 9, to effect the removal, because he wanted to speak with the Tenenbaums before making his decision on whether or not to effect an emergency removal of Sarah. When neither parent contacted him after they had, as far as he knew, been asked by James -- the caseworker -- to do so, he reasonably felt it was imperative to take temporary custody of Sarah. In this regard, it is clear that from defendants' perspective, the situation changed from Monday to Tuesday, and it is disingenuous of the majority in the Court of Appeals to suggest that the decision to remove Sarah could or should have been made on Monday. The facts herein demonstrate that Williams was mindful of his obligation to try to protect Sarah and that that obligation must be tempered by his need not to infringe on the Tenenbaums' right not to be subjected to undue government interference in their family integrity and Sarah's right not to be subjected to unreasonable search and/or seizure. The majority's decision herein punishes the City, and in the future may also punish the individual child welfare worker, for attempting not to act with too much haste and, rather, to reach a difficult balance in a delicate situation.

The sequence of events herein reveals a prudent approach by Williams, who was trying to protect all parties by first confirming or refuting the charges in less intrusive ways before moving to the need for an actual medical examination. Williams testified that he did not have enough information on Friday, January 5, to make a determination, because James had not yet spoken with the

source of the report, Sarah's teacher, Mrs. Murphy. Williams received James' report of her Monday, January 8, visit to P.S. 230 and the interviews she conducted with Sarah and Mrs. Murphy there that day. Williams waited until the following day to effect the emergency removal, because he was expecting a visit or call from the Tenenbaums to discuss the complaint against them. Williams wanted to talk with the Tenenbaums himself, to see if he could substantiate the claim even without a medical exam; if their statements were still equivocal, he knew he would then have enough evidence to constitute a need for the final step -- a medical examination, with or without the parents' permission. When Williams perceived that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him, it was reasonable for him to treat the situation as an emergency. Thus, contrary to the majority's suggestion, there was not a "delay" in removing Sarah from school; instead, there was a careful, progressive investigation that built to the point of requiring the emergency removal.[1]

The relevant question is whether there is an "emergency" at the time the decision is made to remove a

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[1] Whether Williams made the removal decision on Monday or Tuesday is not material. Based upon the information Williams possessed on Monday after James gave her report about her visit to the school, the circumstances were reaching the level of sufficient evidence of "serious ongoing abuse" with "reason to fear imminent recurrence," one of the federal standards for an emergency situation warranting a child's removal without a court order. The urgency of the situation certainly had increased to that point when Williams did not hear from the Tenenbaums, as he reasonably expected to, by the next morning. See Robison v. Via, 821 F.2d at 922. Moreover, if an emergency existed on Monday, such emergency certainly did not dissipate by Tuesday just because the child welfare workers either attempted not to act too hastily or otherwise did not effect the removal as early as theoretically possible.

child. The fact that a child welfare worker or an agency may not have acted as expeditiously as theoretically possible should not be permitted to neutralize "emergency" circumstances. Any delay in effectuating a removal is unrelated to whether "emergency" circumstances exist and should have no bearing on whether an "emergency" removal, without a court order, may be made. As Judge Jacobs noted:

> child welfare officers often must practice triage, deciding which endangered child must wait while another one, in seemingly greater peril, takes precedence. Decisions on emergencies are delayed, reviewed and reconsidered, or stuck in a superior's in-box. And even a child welfare worker over-burdened with real emergencies is a human being who might go to lunch, take a personal day, go home on time, or spend weekends at home.

(A51). Given limited staff and resources, action cannot always be taken at the theoretically earliest possible moment. Any lapse of time, however, can not change the nature of the circumstances a child is in. If it is an emergency, it is an emergency. A caseworker's "delay" does not change the imminence of the danger a child may be in and should not be a reason for creating any further delay in taking a child out of harm's way.

The Second Circuit had previously held that for emergency circumstances to exist, "it is sufficient if the officials have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence." Robison v. Via, 821 F.2d at 922. The Court of Appeals herein announced a new rule, which (1) would make the determination of whether particular circumstances

constituted an "emergency" for removal purposes turn on the limitations of government resources and a second-guessing of "bureaucratic practice and technique" (A49) and (2) would cause child welfare workers to refrain from making necessary emergency removals for fear of being held liable for such action (A51-52).

II.

DEFENDANTS' DECISION TO HAVE SARAH PHYSICALLY EXAMINED IMMEDIATELY UPON HER ARRIVAL AT CONEY ISLAND HOSPITAL WAS JUSTIFIED AS NECESSARY TO DIAGNOSE HER CONDITION AND TO DETERMINE WHETHER SHE WAS IN NEED OF IMMEDIATE MEDICAL TREATMENT.

As it did with regard to the test it enunciated for determining whether a removal constitutes an "emergency" removal, the Court of Appeals erroneously imposed a subjective and impossible-to-apply test to the analysis of whether a medical examination was permissible absent either parental consent or a court order. Moreover, the new standard announced by the Second Circuit surely will result in increased suffering of abused children.

In van Emrik v. Chemung County Department of Social Services, 911 F.2d 863 (2d Cir. 1990), the Second Circuit addressed the question of when a physical examination is lawfully conducted in the course of a child abuse investigation. Therein, this Court found that long-bone x-rays performed in search of evidence of past abuse "were not medically indicated," id. at 867, as they "were not sought to facilitate diagnosis or treatment . . . but to provide investigative assistance to the caseworker." Id. As Judge Jacobs aptly has recognized:

> in *van Emrick* (sic), there was no question that the examination was conducted exclusively to further the forensic investigation: the case worker was seeking evidence of *healed* fractures . . . . The holding of *van Emrik* therefore extends no further than instances in which medical justification is lacking. The case should not be read to bar physical examinations that serve a medical purpose, even if a law enforcement purpose is served as well.

(A55).

Despite the differences between the cases, van Emrik, nonetheless, set forth the principles and standards to be applied herein, clearly barring child welfare workers from obtaining a medical examination that is not medically indicated of a child suspected of being the victim of abuse, absent either parental consent or court authorization (A55). See, generally, van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863. In van Emrik, the record clearly established that the sole purpose of the x-rays was to determine if the child had suffered previous injuries that had healed and gone undetected. See id. at 865. Further, there was no possibility that if the x-rays were not taken immediately, there would be an impact on either the preservation of evidence or the potential danger to the child. Here, however, defendants were searching for current injuries, which may have required immediate treatment. Unlike in van Emrik, not only is there no basis for concluding that the examination herein was solely investigative in nature, but the circumstances herein indicate otherwise.[2] There was a serious possibility that

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[2] In the trial on damages herein, Dr. Warren Seigel, the Director of Adolescent Medicine at Coney Island Hospital in 1990, confirmed that in 1990, the purpose of an examination of a five year old girl brought in

sexual abuse might have taken place in the recent past. If it had, Sarah could have suffered some injury that would be detected only by an examination. If Sarah had had an injury, she may have needed treatment.

The Court of Appeals erroneously decided this issue herein upon a blind adherence to the concept of "investigation" as was appropriately contemplated in van Emrik, based on the facts of that case. Here, the investigatory element of the examination was not merely forensic but was also medical. By failing to recognize that element of this case, which distinguishes it from van Emrik, the Court of Appeals failed to heed this Court's instruction in New Jersey v. T.L.O., 469 U.S. 325 (1985), wherein this Court explicitly stated that the constitutional propriety of a search made without prior judicial authorization "depends on the context within which a search takes place." Id. at 337.

Especially given that Sarah was electively mute, the caseworker could not engage her in conversation to obtain any information about how recently any incident of abuse had taken place and, thus, could not rule out the possibility that Sarah had recently been subjected to abuse and needed immediate medical attention. See Chayo v. Kaladjian, 844 F. Supp. 163, 169 (S.D.N.Y. 1994). Here, the investigative nature of the examination under all the circumstances necessarily encompassed a diagnosis and an assessment of whether Sarah needed immediate treatment. As Judge Jacobs recognized, the medical examination of Sarah was not "purely investigatory,' as *van Emrik* used that term" (A55). Rather, unlike the x-rays in van Emrik, which were performed purely in order "to further the forensic

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to the Hospital with a report of possible sexual abuse was to determine whether the child was injured and needed treatment as well as simply to determine whether, in fact, she had been abused.

investigation" (A55), the examination here had another and distinct medical "investigatory" purpose. "[T]he district court (as well as the majority opinion) fail to appreciate that *medical diagnostics* is also "investigatory" -- in the sense that the physician investigates whether the patient would benefit from treatment" (A55).

For these reasons, not only did performance of the examination not constitute a violation of plaintiffs' Fourteenth Amendment rights, it also did not constitute a violation of Sarah's Fourth Amendment rights. Performance of the medical examination was not unreasonable on the facts here. There was a legitimate and substantial concern that Sarah had been sexually abused and was possibly injured thereby and in need of medical treatment. A balancing of the interests in protecting Sarah from sexual abuse and providing her with necessary medical treatment versus the interest in not invading her personal rights favors conducting the examination under the circumstances presented herein. See Darryl H. v. Coler, 801 F.2d 893, 900-05 (7th Cir. 1986). As in Darryl H., where the Court recognized that a visual inspection by a caseworker can be reasonable in a case of physical abuse, as it could easily reveal evidence of such abuse, a somewhat more intrusive examination by a physician is appropriate in a case of suspected sexual abuse as is presented here, as such an examination would be necessary to reveal evidence of abuse of a sexual nature.

Here, pursuant to New York Social Services Law § 383-b, when the City made the emergency removal of Sarah, which defendants maintain was lawful, see Point I, supra, the Commissioner of Social Services assumed temporary custody of Sarah and the responsibilities accompanying such custody, such as providing adequate medical care. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989); Marisol A. v.

Giuliani, 929 F. Supp. 662, 676 (S.D.N.Y. 1996). If the law does not permit an examination as was made here, upon a legitimate suspicion that a child has been sexually abused, then there will surely be a case in which there is a similar suspicion of abuse that proves to be true, in which an injury to a child goes untreated and the injury is aggravated, because the City did not examine the child until it first obtained a court order, which was not immediately obtainable. Then, not only would the child not have received appropriate medical treatment, but the City might be sued for not having provided adequate treatment in what would surely be alleged to have been a situation where such treatment was "medically indicated." Or, the City will refrain from performing an examination while awaiting a court order, which could take a few days, and in the meantime, evidence of the abuse will disappear and the child will be returned to the same environment and suffer further abuse.

Moreover, the Court of Appeals' new standard improperly turns on the subjective assessment of the child welfare worker, instead of on an objective view of the circumstances. Defendants urge that such important determinations should not depend on the personality, character, whim, or acuteness of the particular child welfare worker assigned to a particular abuse case. The Court of Appeals' determination on this issue appears to turn on Williams' testimony that the purpose of the examination was to determine if abuse had occurred (A27-28). If Williams' sole or primary concern had been to detect and treat any injuries, perhaps the majority would have found the examination here constitutionally permissible. Defendants respectfully submit that Williams' purpose should not be determinative of this issue. Rather, the circumstances alone should determine whether the action taken was appropriate. Here, as there was a real possibility that Sarah had injuries and required treatment, the

examination should be deemed to pass constitutional muster.

The examination here at issue was, at least in part, performed in order for defendants to determine whether Sarah was injured and in need of medical treatment. In addition, if there had been evidence of abuse, such evidence might have dissipated while awaiting a court order. It is naive of the Court of Appeals to liken this case to Chayo v. Kaladjian, 844 F. Supp. 163 (S.D.N.Y. 1994) and Schwimmer v. Kaladjian, 988 F. Supp. 631 (S.D.N.Y. 1997), aff'd, 164 F.3d 619 (2d Cir. 1998), cases involving suspected abuse in which physical examinations conducted without court orders were upheld as "medically indicated" where the children had visible bruises. Unlike a case in which a child is suspected of being beaten, for example, a child suspected of being the victim of sexual abuse likely will not have obvious injuries. Rather, an examination would be necessary both to detect any injuries and to determine if treatment is needed. Under all these circumstances, the competing interests should give way to the protection of the child.

As Dr. Seigel, the doctor in charge of Adolescent Medicine at Coney Island Hospital at the time later testified, it was a routine practice at Coney Island Hospital to perform medical examinations of children suspected of being the vietims of sexual abuse, in order to determine whether they required immediate medical treatment. Sarah's condition and need for treatment were unknown to defendants. Especially as she was electively mute and did not communicate with defendants, defendants could have discovered if she was injured and in need of treatment only by having her examined by medical personnel. The Fourth Amendment is satisfied because the performance of such an examination in the face of the evidence here, indicating that Sarah may have been sexually abused, was entirely

appropriate and reasonable. In van Emrik, as this Court ruled, the x-rays that were found to be unlawfully taken without a court order did not facilitate either diagnosis or treatment. See van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863, 867 (2d Cir. 1990). Here, the examination not only facilitated but clearly was necessary to make both a diagnosis and a determination as to whether treatment was needed. As such, the cases are entirely distinguishable.

Finally, the Court of Appeals' observation that "if Sarah had ever been in imminent danger, she was not by the time she was taken to the hospital" (A28), further highlights the Court's failure to acknowledge the possibility that Sarah had injuries and was in need of treatment. The fact that she may no longer have been in imminent danger of further abuse has no relevance to whether she may have needed treatment for any recent abuse. Certainly, merely being in CWA custody does not protect a child from the effects of past abuse, particularly if CWA is not permitted to take the steps necessary to detect any such abuse and treat any injuries therefrom.

Defendants maintain, as they have throughout, that if, under circumstances such as those presented here, they could not arrange to have a medical examination performed without a court order, the result, in some cases, would be that abused children would be returned to abusive households because the evidence of the abuse would have disappeared by the time the examination was performed. And in some cases, necessary treatment would be denied or at least delayed, because defendants were not able to discover that it was needed. The choice is between erring on the side of performing medical examinations on children regarding whom no evidence of abuse is ultimately found or not performing them on children regarding whom evidence of abuse exists but is not found, resulting in the

children being subjected to further abuse. The impact of the Court of Appeals decision herein will be both widespread and of great magnitude. As the Court of Appeals has created an unprecedented standard that is unsupported by any decision of this Court, this is an appropriate matter for this Court's review.

CONCLUSION

For the reasons set forth, petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

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